Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~1870~~ 70-325

THE TRAVELERS INSURANCE COMPANY,
Petitioner,

vs.

SUE F. SMITH, Executrix of the Estate of Ray P. Smith,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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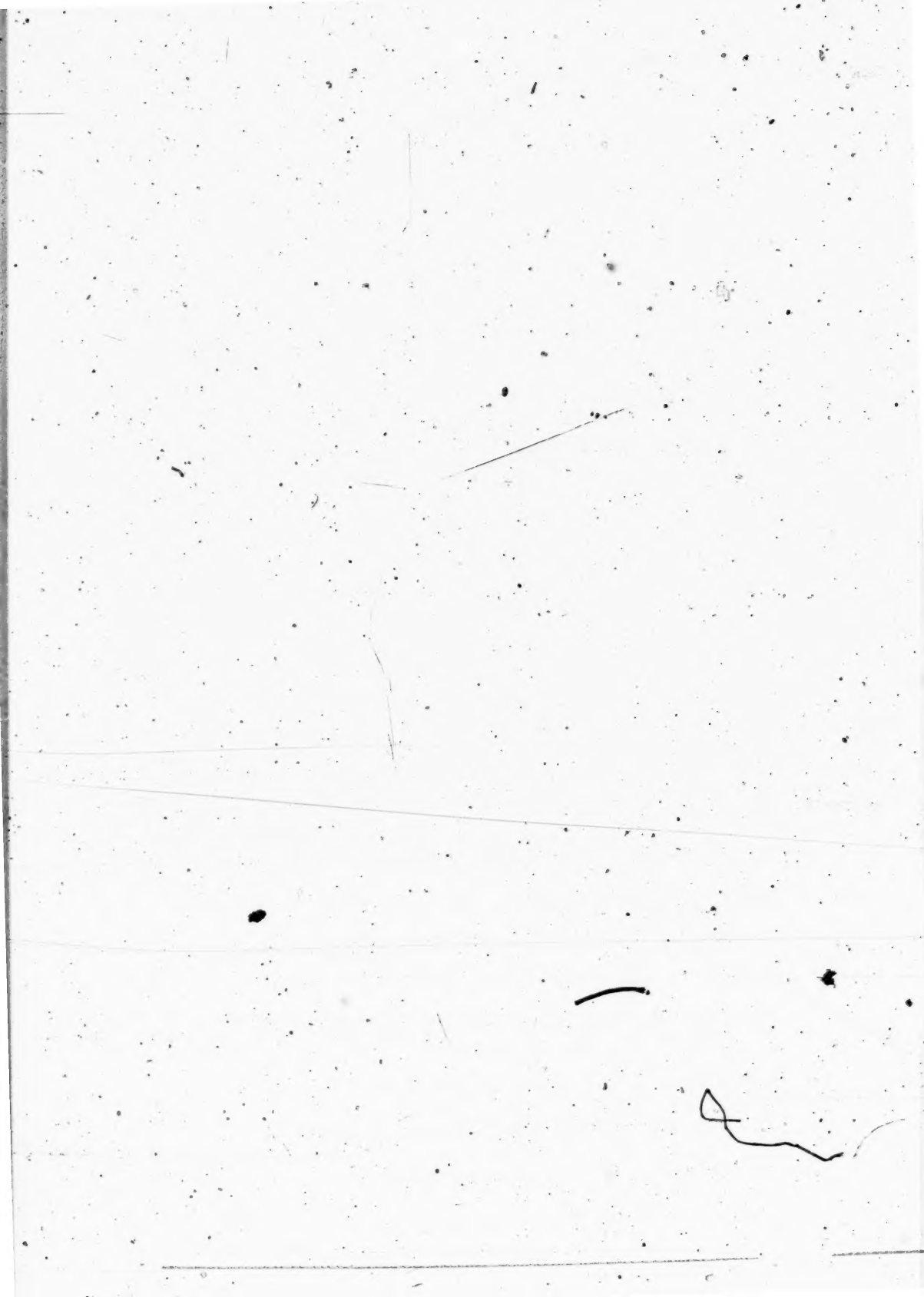

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THE TRAVELERS INSURANCE COMPANY,
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SUE F. SMITH, Executrix of the Estate of Ray P. Smith,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

Petitioner, The Travelers Insurance Company, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit entered March 23, 1971, denying a petition to re-hear that Court's judgment entered on February 17, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit on March 23, 1971, denying the petition to re-hear is unreported. The opinion of that Court affirming the United States District Court for the Eastern District of Tennessee, Winchester Division, is reported in 438 F. 2d 373 (1971). The District Court opinion is reported in 310 F. Supp. 726.

JURISDICTION

Petition to re-hear was denied in the United States Court of Appeals for the Sixth Circuit on March 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTION PRESENTED

The question presented by this petition is whether petitioner is entitled to a new trial on the basis of the highly prejudicial and inflammatory closing argument of opposing counsel to the jury to which prompt and timely objection was made.

The basic facts in this case are not in dispute. This is a removed diversity action wherein petitioner issued a $50,000.00 Travel Accident Policy to respondent's husband. The insured was killed while driving a pickup truck owned and registered in the name of Smith Machine and Tool Company, a business owned by the insured. The insurance policy covered the insured while "riding as a passenger or operator in . . . a passenger automobile of the pleasure car type. . . ." The jury in the United States District Court for the Eastern District of Tennessee, Winchester Division, awarded respondent $50,300.00, $300.00 of which was as a penalty for bad faith for refusal of petitioner to pay respondent's claim and her costs of action. The District Judge denied petitioner's motion for a new trial and for a judgment notwithstanding the jury verdict.

One of the primary questions raised upon appeal in this petition and the real crux of the issues tried in the trial court before the jury was the trial court's taking judicial notice of the fact that the pickup truck driven by the insured was a "passenger automobile within the meaning of the policy" and submitting to the jury only

the issue of whether or not said truck was "of the passenger car type."

The third question presented addresses itself to the error of the District Court in admitting into evidence two letters written by the respondent's attorney to the petitioner after denial of respondent's claim by petitioner. Both letters were admitted by the Court solely on the issue of petitioner's bad faith.

The United States Court of Appeals for the Sixth Circuit in its opinion found the remarks of respondent's counsel ". . . were in extremely poor taste and were obviously designed to prejudice the jurors", but the Court went on to say that it could not find "affirmatively" that the remarks were so prejudicial as to affect the result of the trial and therefore require a new trial. The portion of counsel's argument complained of is as follows:

> "Talk about big companies—I noticed two times these insurance lawyers—let's talk about these big insurance lawyers, two or three of them, representing the big insurance companies up here out of Hartford. Not even residents of Tennessee—not even a resident here. Let's talk about that (T. 176-77).
>
> "And you know why that thing (insurance policy) is phrased that way. They have got a great big staff of fine city lawyers like Mr. Glasglow and Mr. Taylor (appellant's counsel), one writing and one talking, one going and one coming, and one showing, and two looking, and two following, that it is the way it works, and it takes all of them—'Philadelphia lawyers' some folks call them—city lawyers, to make up a mess like this in this amount of pages (T. 178).
>
> "We are not coming in here and saying because this is a big non-resident insurance corporation that don't (sic) even live here in Tennessee. We are not saying give us a verdict on account of that. We are saying

look at this policy, the scope of it, the intent—what they meant to do (T. 180).

"Let's don't (sic) take that magnifying stuff that is put in there with a battery of lawyers, lawyers that are a lot smarter than I am, because I don't know a whole lot about these things. Let's look at what they meant to do (T. 180-81).

"I'll tell youn what! Let's send them back up to Hartford and let them know how we feel about it in Tennessee" (T. 181). 438 F. 2d 373, 375, Note 2.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The only statute involved concerns the allowance of a penalty for bad faith and is as follows:

"TCA 56-1105. ADDITIONAL LIABILITY UPON INSURERS FOR FAILURE TO PAY PROMPTLY INSURANCE LOSSES WHEN REFUSAL IS NOT IN GOOD FAITH.—A. The insurance companies of this state, and foreign insurance companies and other persons doing an insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty (60) days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent (25%) on the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court of jury trying the case, be measured by the additional expense, loss, and injury thus entailed."

STATEMENT

This case involves the basic right to a fair and impartial trial without prejudice or favor. The United States Court of Appeals for the Sixth Circuit adopted an erroneous interpretation of Tennessee law applicable to the penalty for a bad faith denial of liability under an insurance policy and erred in holding that the highly prejudicial and inflammatory argument of respondent's counsel did not "affirmatively" affect the verdict of the Court.

Petitioner submits that the United States Court of Appeals for the Sixth Circuit based its holding that it could not find the argument "affirmatively" affected the verdict of the jury upon an erroneous impression that the jury awarded respondent only $300.00 for the bad faith penalty when it could have awarded her as much as $12,500.00. This is erroneous inasmuch as $300.00 was the maximum amount the jury could have awarded to respondent under the statute TCA 56-1105 and the District Judge so indicated to the jury when he said at page 196 of the transcript:

> ". . . It was incumbent upon Mrs. Smith to prove the amount of any such loss, damage or other expense by the greater weight of the evidence, and the extent of her claim in this regard, as the Court remembers the testimony is $300.00" (T. 195).

That the United States Court of Appeals for the Sixth Circuit misunderstood the statute involved and based thereon its finding that the jury verdict could not be said to have "affirmatively" affected the amount of the verdict is clearly evident from the following language of its opinion at page 375:

> ". . . If bad faith were shown, under Tennessee law the jury could have awarded appellee a maximum of twenty-five per cent of the face amount of the policy.

T.C.A. § 56-1105 (1968). In the case at bar, although the maximum possible penalty would have been $12,500.00, the jury **only** awarded appellee $300.00 for appellant's bad faith . . ." (emphasis added).

The Court further amplified its error in saying at page 376:

". . . The amount of damages the jury allowed ($300.00) was approximately two and one-half per cent of the total amount appellee had sought for appellant's bad faith refusal to pay on the policy is also significant. **The relatively small amount awarded by the jury is indicative of its careful weighing of the evidence.**" (Emphasis added).

The "relatively small amount awarded by the jury" contrary to the Court's finding did not represent two and one-half per cent of the total the jury could have awarded but consisted rather of one hundred per cent of that sum. It is respectfully submitted that this is an "affirmative" showing of the effect the prejudicial argument of respondent's counsel had upon the jury.

The petitioner respectfully insists that under Tennessee law this improper argument constituted reversible error. In the case of **Nashville Ry. & Lt. Co. v. Owen**, 11 Tenn. App. 19 (1929) the Tennessee Court of Appeals considered improper remarks made by plaintiff's attorney and reversed the trial court and ordered the cause retried. After considering prior cases, the following remark was made:

"From this it will be seen that our Supreme Court has held that the trial judge should have rebuked the attorney, even without objection." 11 Tenn. App. 19, 32.

The Court goes further to state that even if defendant's attorney had used bad taste or judgment, or even mis-

conduct, it would not condone like action by plaintiff's counsel in his closing argument.

The case of **N. C. & St. L. Ry. v. Mangrum**, 15 Tenn. App. 518 (1932), presented questions to the Tennessee Court of Appeals which were much akin to those presented by this appeal. In the **Mangrum** case plaintiff's counsel made the following remarks:

> "Oh, that careless, cold-hearted deathless attitude to people of these great corporations, these great railway corporations, . . ." 15 Tenn. App. 518, 521.

At this point, counsel for defendant moved for a mistrial. Said motion was overruled and the court instructed the jury to disregard these remarks and decide the case solely on the law and evidence. The Court of Appeals held that the entire argument of plaintiff's counsel could be examined, even if no objection was made to other parts. The court found that the attorney had said that the defendant was a "giant railway company," a "great power trust," "big business" and employed "learned counsel, paid perhaps by the year for their services." 15 Tenn. App. 518, 525. The court treated these remarks as follows:

> "There was no evidence to justify the attempt to influence the jury by appealing to its prejudice against the defendant corporation. Even if some of the language used was not specifically excepted to, this makes little difference, as the courts lay down the rule that it is the duty of counsel for plaintiff and of the trial court to see that such an appeal to the jury is not made and that defendant gets a fair trial. **Watkins v. State**, 140 Tenn. 1, 203 S.W. 344; **New York Central v. Johnson**, 279 U.S. 310; **Turner v. State**, 72 Tenn. 106; **Pullman Co. v. Pennock**, 118 Tenn. 565.
>
> There are many other cases dealing with this question of the misconduct of attorneys in addressing

juries. Other cases should be cited which have been reversed on account of language used in argument, no stronger than that complained of in the present case. The cases cited herein are in accord with the current of authority, and show that the arguments objected to constitute reversible error." 15 Tenn. App. 518, 525.

In **Pullman Co. v. Pennock**, 118 Tenn. 565 (1907), the Tennessee Supreme Court considered a verdict as excessive where the plaintiff's attorney had referred to the defendant as a "vast and wealthy corporation: with the 'public . . . absolutely at its mercy'" and that a verdict for $10,000.00 had been sustained against them previously. The defendant objected and was sustained and the plaintiff's attorney was fined when he persisted in pursuing the argument. The trial court overruled defendant's motion for a new trial and the Supreme Court reversed.

"It is immaterial that the objection to the improper matter was sustained, and that counsel was reprimanded and fined. The purpose of counsel had been accomplished. The jury had been inoculated with the poison of the foreign matter improperly injected in the case, and every lawyer of experience knows the impossibility of removing the impression that has been made. It cannot be done. No verdict should be allowed to stand where counsel deliberately and persistently inject into the record matter calculated to prejudice the jury against the opposite party and influence the jurors in their deliberations. Tampering with juries in or out of court in any form cannot be tolerated. It corrupts the very fountain of justice and renders a trial worse than a farce. The client is responsible for the action of his attorney, and cannot be allowed to reap a benefit improperly obtained by him. The conduct of counsel in this case

could not have been intended for any other purpose than to cause the jury to render an excessive verdict, and it is evident, considering the size of that found and the injuries sustained by the plaintiff, that his efforts were successful.

This assignment of error is sustained, the judgment of the trial court reversed, and the case remanded for a new trial." 118 Tenn. 565, 569.

The excessive verdict in the **Pennock** case was $500.00.

Petitioner maintains that there is no material distinction to be made between the arguments condemned above and the following made by respondent's attorney:

"Talk about big companies—I noticed two times these insurance lawyers—let's talk about these big insurance lawyers, two or three of them representing the big insurance companies up here out of Hartford. Not even residents of Tennessee—not even a resident here. Let's talk about that" (T. 176-77).

* * * * * * * *

"I'll tell you what! Let's send them back up to Hartford and let them know how we feel about it in Tennessee" (T. 181).

"And you know why that thing is phrased that way. They have got a great big staff of fine city lawyers like Mr. Glasgow and Mr. Taylor, one writing and one talking, one going, and one coming, and one showing, and two looking, and two following, that is the way it works, and it takes all of them—'Philadelphia lawyers' some folks call them—city lawyers, to make up a mess like this in this amount of pages. Why didn't they exclude it if they didn't mean to cover it. They have got plenty of paper in these policies, and a lot of that print I can read with a double magnifying glass and call your family lawyers, or your city lawyer, and

you still don't know what it means. You pay your money for it and you make a claim and they say, 'Why it is not covered.' 'Didn't you read clause B under paragraph C over on the left side and right under that?' See, if you look and see it. That is the kind of treatment you get" (T. 178).

"We are not coming in here and saying because this is a big non-resident insurance corporation that don't even live here in Tennessee. We are not saying give us a verdict on account of that. We are saying look at this policy, the scope of it, the intent—what they meant to do.

Let's don't take that magnifying stuff that is put in there with a battery of lawyers that are a lot smarter than I am, because I don't know a whole lot about these things. Let's look at what they meant to do.

If this company didn't mean to take this pick-up and include it in this man's policy and cover him, why didn't they take it out of there? Why, Mr. Glasgow? Travelers Insurance Company up there in Hartford. Why? I'll tell you why. It didn't create any greater risk to them. What greater risk did this insurance company incur with this man riding in his little pick-up that he liked to drive and ride in as opposed to driving the family car. What greater risk? Why did you tell us that, Mr. Insurance Company Lawyers? I will tell you why, because there wasn't any greater risk. Wasn't none. They were just betting on this, how many people would lose their life accidentally as opposed to the number of policies they sell. Most people die of natural normal causes. And they took their money and handed them this bunch of paper—this is just about what it amounted to—and it almost met it letter for letter, and they don't want to pay it" (T. 180-181).

Petitioner maintains that the proof submitted to the jury was susceptible to a verdict either for or against the defendant. More than ample proof had been given that the truck in question was owned by a business and claimed as a business expense for tax paying purposes. The jury could easily have determined that the truck was not of the "pleasure car type" even under the trial court's charge noticing it was a passenger automobile. The comments of respondent's attorney were an impermissible, flat-footed leap on the scales of justice to tip the balance in his favor. They were designed and delivered with polish and precision and were obviously intended to incite and inflame the jury against the petitioner. Under Tennessee law and sound judicial principles, the judgment should not be allowed to stand.

This prejudicial effect was amplified by the erroneous admission of respondent's two letters to petitioner as evidence. These two exhibits were letters written to the petitioner by respondent's attorney and show on their face that they were written **after** the claim had been denied. Indeed, one was written almost six months after the denial.

The trial court in its opinion relies on the case of **Block v. Darling** (1891), 140 U.S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476, 478 (head note 4) (App. pp. 46-47). Although the head note to this case may give the respondent some support, the actual language of the case bears out that the letter in the **Block** case were written by the **defendant** and the court felt they had a bearing on the transaction from which the claims arose. In the **Block** case there was a counter-claim which was litigated. In the instant case the counter-claim was non-suited (T. 7-10). The letters then became nothing more than self-serving declarations by the respondent making derogatory remarks about the defendant and threatening investigation by the Tennessee Department of Insurance and Banking. Cer-

tainly the respondent's attorney's remarks about what he considered a "hard-nosed" attitude on the part of the petitioner could not, conceivably offer any service to the jury in determining the good or bad faith of the petitioner at the time it denied the respondent's claim. The respondent's attorney had ample opportunity to harangue and criticize the petitioner before the jury, which he did extensively, without permitting him to introduce his written criticisms as well.

It is necessary to go back many years in Tennessee jurisprudence to find a case dealing with a point which is ordinarily treated in a summary fashion by the trial courts. In **Jenkins v. Pickett**, 17 Tenn. 480 (1836), the plaintiff's lawyer testified that the plaintiff had written him to bring the suit involved. This testimony was offered to prove that plaintiff owned the books involved in the suit. The court held this testimony inadmissible and illegal and reversed the lower court.

> "No rule of evidence is better settled or based on wiser principles than that which says that no man shall give evidence for himself. To sustain the legality of this proof would be to destroy the rule." 17 Tenn. 480, 485.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it presents a question basic to the constitutional guarantee of the right to a trial by a fair and impartial jury. The misinterpretation of Tennessee law as to the bad faith penalty by the United States Court of Appeals for the Sixth Circuit should be squarely faced and the error corrected. Both the trial court and the United States Court of Appeals for the Sixth Circuit concluded, and no other conclusion would be reasonable, that the remarks of respond-

ent's counsel were obviously designed to prejudice the jurors.

At issue is a matter of utmost importance to the protection of the jury system and the guarantee of a fair and impartial trial.

The serious questions of public policy involved here and the effect of the decision below, both within the State of Tennessee and the effect of similar decisions in other states, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Sixth Circuit

Sue F. Smith, Executrix of the Estate of Ray F. Smith,
Plaintiff-Appellee,
v.
The Travelers Insurance Company,
Defendant-Appellant.

No. 20,448

Order

(Filed March 23, 1971)

Before: Edwards and Miller, Circuit Judges, and O'Sullivan, Senior Circuit Judge

In this action appellant, the Travelers Insurance Company, has filed a Petition to Rehear the Court's opinion decided and filed February 17, 1971. The argument is made in the Petition to Rehear that the Court adopted an erroneous interpretation of the Tennessee law applicable to the penalty for a bad faith denial of liability under an insurance policy. This argument is addressed to the Court's observation in its opinion that if bad faith had been shown the jury could have allowed a maximum of $12,500 as a penalty, whereas the jury only awarded $300 for appellants bad faith. It is true that it is incumbent upon the plaintiff under Tennessee law to prove the amount of his actual loss and that only the amount so proved is recoverable as a penalty under the Tennessee statute. The trial court so instructed the jury. He advised

the jury that the "maximum penalty which you are permitted to award Mrs. Smith is $12,500, or twenty-five per cent of the face amount of this policy. You may award a lesser amount" . . . depending upon the proof of actual loss. He added that his recollection was that the extent of her claim in this regard was $300.00. Thus it was left to the jury to make a penalty award up to the statutory maximum of $12,500.00.

As reflected by our opinion of February 17, 1971, the Court was of the view that the alleged prejudicial remarks of counsel should not be the basis for a reversal because "in the context of the entire record and in view of the curative instructions given by the District Judge and the other statements by counsel for both parties, we cannot find 'affirmatively' that the remarks were so prejudicial as to affect the result of the trial and therefore require a new trial." The Court remains of the opinion that when the entire pattern of the trial is considered, the challenged remarks of appellee's counsel before the jury should not result in a reversal of the District Court's judgment.

It is accordingly Ordered that appellant's Petition for Rehearing be and the same is hereby denied.

Entered by Order of the Court

CARL W. REUSS
Clerk

No. 2448

United States Court of Appeals
For the Sixth Circuit

Sue F. Smith, Executrix of the Estate of Ray F. Smith, Plaintiff-Appellee, v. The Travelers Insurance Company, Defendant-Appellant	Appeal from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided and Filed February 17, 1971.

Before: Edwards and Miller, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Miller, Circuit Judge. This removed diversity action concerns appellant's ability on a $50,000.00 Travel Accident Policy issued to appellee's husband. The insured was killed while driving a pickup truck owned and registered in the name of the Smith Machine Tool Company, a business owned by the insured and his family. The insurance policy covered appellee's husband while "riding as a passenger or operator in . . . a passenger automobile of the pleasure car type . . ." (App. 9). In the United States District Court for the Eastern District of Tennessee, Winchester Division, the jury awarded appellee $50,300.00, $300.00 of which was as a penalty for appellant's bad faith refusal to pay her claim and her costs of action.

The District Judge denied appellant's motion for a new trial and for a judgment notwithstanding the jury verdict. The appellant raises numerous questions on appeal, only four of which we find necessary for discussion

Appellant objects to certain jury instructions given by the trial court.[1] Since the appellant did not object to these instructions before the jury retired to consider its verdict, the appellant cannot raise the objections on appeal. Rule 51, Federal Rules of Civil Procedure. See *Transamerican Freight Lines v. Universal Die Cast Co.*, 192 F.2d 931 (6th Cir. 1951). Although this court has strayed from the rigid application of this rule in an exceptional case "where the error is obvious and prejudicial to a party," *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 166 (6th Cir. 1967), we do not find sufficient evidence of "plain error" to warrant the application of the exception in this action. The trial court's application of the relevant Tennessee law, which was used in his jury instructions, reflected a reasonable interpretation of the controlling Tennessee authority and did not constitute the "obvious error" required.

Appellant also objects to the admission into evidence of two letters, entered as Exhibits Five and Seven, written to the appellant by appellee's attorney after denial of appellee's claim. Both letters were introduced solely on

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[1] Relying on *Aetna Life Ins. Co. v. Bidwell*, 192 Tenn. 627, 241 S.W.2d 595 (1951), the District Court took judicial notice of the fact that the pickup truck driven by the insured was a "passenger automobile within the meaning of this policy." The jury was instructed to treat it as such (App. 48). The jury was left to decide whether the vehicle was "of the pleasure car type." In its deliberations the jury was instructed to consider the general use of this particular vehicle. The appellant, objecting to the court's instructions on the "passenger car" issue and its reliance on *Bidwell* as controlling, argues that the issue of whether this vehicle was a "passenger automobile" should have been left to the jury. No question is raised concerning the court's action in leaving to the jury the issue whether the vehicle was "of the pleasure car type" within the meaning of the policy.

the issue of appellant's alleged bad faith refusal to pay on the policy within sixty days after the policyholder had made a demand for payment. If bad faith were shown, under Tennessee law the jury could have awarded appellee a maximum of twenty-five per cent of the face amount of the policy. T.C.A § 56-1105 (1968). In the case at bar, although the maximum possible penalty would have been $12,500, the jury only awarded appellee $300 for appellant's bad faith. The insurer's good or bad faith is a jury question. *Palatine Ins. Co. v. E. K. Hardison Seed Co.*, 42 Tenn. App. 388, 303 S.W.2d 742 (1957). We do not find it necessary to decide whether these letters were properly admitted into evidence, for assuming *arguendo* that they were improperly admitted, we find that the jury was presented with ample admissible evidence from other sources to find bad faith. Any error in admitting the letters would therefore be harmless under both federal, *Masterson v. Pennsylvania R. Co*, 182 F.2d 793 (3rd Cir. 1950), and Tennessee law. *Gardner v. Burke*, 28 Tenn. App. 119, 187 S.W.2d 25 (1944). Accordingly, the verdict cannot be set aside for this reason. 28 U.S.C. § 2111 (1964); T.C.A. § 27-117 (1955).

Appellant further complains of the closing argument of appellee's counsel where references were made to appellant's corporate status, its residence in another state, and its reliance on "fine city lawyers".[2] Appellant maintains

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[2] In his closing argument, the appellee's attorney made the following statements:

"Talk about big companies—I noticed two times these insurance lawyers—let's talk about these big insurance lawyers, two or three of them, representing the big insurance companies up here out of Hartford. Not even residents of Tennessee —not even a resident here. Let's talk about that (T. 176-77).

'And you know why that thing [insurance policy] is phrased that way. They have got a great big staff of fine city lawyers like Mr. Glasgow and Mr. Taylor [appellant's counsel], one writing and one talking, one going and one coming, and one showing, and two looking, and two following, that it is the way it works, and it takes all of them—'Philadelphia lawyers'

that these statements were so prejudicial as to require a new trial. We agree that the remarks were in extremely poor taste and were obviously designed to prejudice the jurors. Taken alone the statements may well have been prejudicial. Yet, in the context of the entire record and in view of the curative instructions given by the District Judge and the other statements by counsel for both parties, we cannot find "affirmatively" that the remarks were so prejudicial as to affect the result of the trial and therefore require a new trial. *Addison v. United States,* 317 F.2d 808 (5th Cir.), cert. denied, 376 U.S. 905 (1953); *Williams v. Bridgeford,* 53 Tenn.App. 381, 383 S.W.2d 770 (1964); *Petway v. Hoover,* 12 Tenn.App. 618 (1931).

The jury was faced with two questions of fact. First, whether the vehicle in which the deceased was killed was of the pleasure car type. Secondly, whether the appellant acted in bad faith in refusing to pay the appellee's claim. The jury answered both questions in the affirmative. After a careful review of the record, we cannot say that the jury's conclusions were based on anything but a reasoned view of the evidence.

The District Judge properly admitted evidence of the use of the particular vehicle in question on the first issue. *Aetna Life Ins. Co. v. Bidwell,* 192 Tenn. 627, 241 S.W.

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some folks call them—city lawyers, to make up a mess like this in this amount of pages (T. 178).

"We are not coming in here and saying because this is a big non-resident insurance corporation that don't [sic] even live here in Tennessee. We are not saying give us a verdict on account of that. We are saying look at this policy, the scope of it, the intent—what they meant to do (T. 180).

"Let's don't [sic] take that magnifying stuff that is put in there with a battery of lawyers, lawyers that are a lot smarter than I am, because I don't know a whole lot about these things. Let's look at what they meant to do (T. 180-81).

"I'll tell what: Let's send them back up to Hartford and let them know how we feel about it in Tennessee" (T. 181).

2d 595 (1951). At the trial virtually all of the witnesses testified that the deceased had used this vehicle for pleasure rather than business purposes.

The jury's response to the second question, concerning appellant's alleged bad faith refusal to pay the claim, was also supported by substantial evidence. Although the appellant could arguably contend that the policy did not cover the vehicle in which the deceased was killed, its method of investigating the claim and of informing the appellee of its decision were sufficient to warrant a finding of bad faith. Appellant had had its agent contact the appellee and obtain a signed statement from her eleven days after appellee's attorney had instructed the appellant to conduct future communications through him. Similarly, appellee had refused to state in writing its precise reasons for denying recovery,[3] although it had made a cryptic oral statement which was neither specific nor complete. These events could justify the jury's finding of bad faith in appellant's denial of liability. That the amount of damages the jury allowed ($300.00) was approximately two and one-half per cent of the total amount appellee had sought for appellant's bad faith refusal to pay on the policy is also significant. The relatively small amount awarded by the jury is indicative of its careful weighing of the evidence. Regarding the allegedly prejudicial remarks, counsel for appellant himself told the jury of his client's corporate status and foreign residency before appellee's attorney brought out the same points (T. 164). In addition, perhaps realizing the possible adverse effects of his vituperative argument, appellee's attorney tried to dull the impact of his own remarks. Immediately before the jury received its

[3] The appellant later informed the appellee's attorney in writing only that: "We must respectfully decline the claim made by Mrs. Smith [the appellee] as a result of her husband's death as his death did not occur in accordance with the terms and conditions of the policy. As you know, this is a limited Travel Policy and is not a blanket accident death policy" (App. 21).

charge and immediately after the remarks complained of were made, the appellee's attorney told the jury:

> Ladies and gentlemen, whatever you feel is fair in your judgment, disregard my feelings, and this insurance company's feelings, and listen to His Honor's charge . . . .. (T. 182).

Similarly, on two occasions the District Judge took curative measures to erase the prejudicial impact of appellee's attorney's statements. While the abrasive remarks were being made the court sustained appellant's objection and noted in the jury's presence that "Yes, there has been too much appeal to prejudice" (T. 181). He then immediately instructed the jury: "Just disregard all this and decide it on the facts and the law as the Court gives it to you" (T. 181).

Furthermore, in his charge to the jury the court went to considerable lengths to instruct the jury to avoid giving any weight to the improper remarks of appellee's attorney:

> You must not be biased or prejudiced toward anyone involved, and must not be governed by sympathy, prejudice, or public opinion.
>
> It's been a long time since this particular judge has heard as much pure appeal to prejudice as in this case. That has nothing to do with the right and wrong of the matter
>
> You are to consider fair [sic], fully, and without partiality all of this evidence, follow the law as stated to you by the Court, and arrive at the verdict which you think is just, fair, and right under all of the proof.
>
> This lawsuit should be decided by you as if it were an action between persons of equal standing in the

> same community, of equal worth, who held the same stations in life. In no other way can you do even handed justice between the parties involved in this action.
>
> The defendant happens to be a corporation, and a corporation is entitled to the same fair treatment at your hands as a private individual. The law is no respector [sic] of persons, and a corporation is, in the eyes of the law, a person. All persons including a corporation, stand equal before the law and are to be dealt with as equals in a court of justice (T. 184).

Finally, appellant contends that the rule of "judicial estoppel" should be used to preclude appellee from asserting a position inconsistent with his prior sworn income tax statement. This argument is based on the fact that although the truck in which the deceased was killed was depreciated as a business deduction by and the title placed in the name of the Smith Machine and Tool Co., virtually all of the witnesses testified that the vehicle was uesd for purely personal purposes. If the jury had found that the vehicle had been used primarily for business activities, it is doubtful that the appellee could have recovered under the insurance policy. Despite the seeming conflict in the positions of the company in its income tax forms and the witnesses in the instant action, we find no cases where the Tennessee doctrine of judicial estoppel was extended to inconsistencies between judicial and non-judicial statements. See *e.g., Helfer v. Mutual Benefit Health and Acc. Ass'n.*, 170 Tenn. 630 (1936). See also, *United States v. Certain Land and Interests in Property*, 225 F.Supp. 338 (M.D.Tenn. 1964).

Affirmed.

District Court Memorandum Opinion and Order

(Filed March 18, 1970)

This is a removed diversity action for breach of a contract of insurance. The defendant insured the plaintiff's husband for an amount up to $50,000 resulting from his accidental bodily injuries which occurred while he was "* * * riding as * * * [an] * * * operator in * * * a passenger automobile of the pleasure car type * * *." The plaintiff was the named beneficiary in the policy, which was in effect on May 15, 1967, when her husband died as a result of accidental bodily injuries which occurred while he was riding as an operator in a pickup-type automobile. Mrs. Smith filed proper notice and proof of loss with the defendant, agreeably with the requirements of the policy. The defendant refused to pay her claim, on the ground that the motor vehicle in which her husband was the operator at the time he was killed was not a passenger automobile of the pleasure car-type. Mrs. Smith sought recovery of the principal amount of the policy and the statutory "bad-faith" penalty.

The Court required the jury to return only special verdicts in the form of special written findings on the crucial issues of fact, each of which was submitted as a written question susceptible of a brief answer. In response thereto, the jury found that the vehicle operated by the deceased at the time of his death was of the pleasure-car type; that the defendant Travelers Insurance Company acted in bad faith in refusing to pay Mrs. Smith's claim; and awarded her $300 as a penalty for the defendant's bad-faith-refusal to pay her claim. It having been stipulated that, if entitled to recover under the policy, Mrs. Smith was entitled to recover the full value of $50,000, the Court applied appropriate legal principles to the facts found by the jury in its special verdicts and entered judgment that the

plaintiff Mrs. Smith recover of the defendant company the sum of $50,000 with interest thereon as provided by law plus the sum of $300 as penalty for the defendant's bad-faith-refusal to pay her claim and her costs of action. **Thedorf v. Lipsey**, C. A. 7th (1956), 237 F. (2d) 190, 193 [10].

The defendant has filed seasonably a motion for a new trial, Rules 59 (a) (1), (b), Federal Rules of Civil Procedure, or for a judgment in its favor notwithstanding the verdicts of the jury, Rule 50(b), Federal Rules of Civil Procedure. The Court has considered each ground urged in support of such motions and finds them to be without merit.

The Court charged the jury, *inter alia*, as follows:

"* * * It's the Court's duty to construe this policy for you; and, under the pertinent terms of this contract, the defendant Travelers Insurance Company was liable to Mrs. Smith for the full amount of the policy if the insured Mr. Smith lost his life as a result of accidental bodily injuries while he was operating a passenger automobile of the pleasure-car type.

"The Court judicially notices that a vehicle such as that driven by the deceased Mr. Smith at the time of his death is a passenger automobile within the meaning of this policy. However, whether this particular pick-up truck was further 'of the pleasure-car-type' is a question which you, and you alone, must determine from all the evidence before you.

"One of the tests you should apply in making your determination is to consider the use to which this particular truck was commonly and generally put. In this regard, you would consider whether it was generally used for business purposes, or whether it was most generally and commonly used as a pleasure

car; that is, for Mr. Smith's own personal enjoyment. But, this is only one test to apply in arriving at your ultimate decision as to whether the vehicle in question was 'of the pleasure-car type'; for, it is the type of vehicle, rather than the use to which it was commonly and generally put by Mr. Smith, which determines whether Mrs. Smith may recover in this action. * * *"

These instructions accorded with the applicable law of Tennessee. See **Aetna Life Ins. Co. of Hartford, Conn. v. Bidwell** (1951), 192 Tenn. 697, 241 S. W. (2d) 595, 596 [1], 597 [6], 598-599 [7], 599 [8], 599-600. For authority that the motor vehicle in question was an automobile, see **Life & Casualty Ins. Co. v. Cantrell** (1933), 166 Tenn. 22, 57 S. W. (2d) 792 [3]. Thus, there was no error in the instructions. Further, based upon the evidence provided by the respective testimonies of Mrs. Smith, James A. (Jack) Puckett, Norman Bost, Felix Gipson, Mrs. Felix Gipson and Douglas Smith, the finding that the automobile in question was of the pleasure-car type was one which the jury could have reasonably reached. **Duncan v. Duncan**, C. A. 6th (1967), 377 F. (2d) 49, 52 [1-5], certiorari denied (1967) *sub nom.* **Fain v. Duncan**, 389 U. S. 913, 88 S. Ct. 239, 19 L. Ed. (2d) 260.

The defendant complains that it was denied its right to have all issues in which the evidence was in conflict decided by a jury. Constitution of Tennessee,[1] Article I, § 6, Article VI, § 9; **Finks v. Gillum**, C. A. Tenn. (1954), 38 Tenn. App. 304, 273 S. W. (2d) 722, 726 [10]. "* * * Special verdicts and interrogatories are authorized by Rule 49 (a), (b) of the Federal Rules of Civil Procedure, and federal courts are governed by such rules of practice and procedure, rather than those of the State court.

[1] Mistakenly cited by the defendant as the Constitution of the United States.

* * * "**Gulf Refining Co. v. Fetschan**, C. C. A. 6th (1942), 130 F. (2d) 129, 134 [10], certiorari denied (1943), 318 U. S. 764, 63 S. Ct. 666, 87 L. Ed. 1136.

In his summation to the jury, counsel for the defendant made reference to the fact that plaintiff's counsel was her son-in-law and the son-in-law of her decedent. Thereafter, plaintiff's counsel responded to this reference in his closing argument. He referred to "big insurance lawyers", "big companies", "big insurance lawyers, two or three of them, representing the big insurance companies * * * out of Hartford, not even residents of Tennessee". There was no objection to any of the foregoing.

Afterward, the plaintiff's attorney stated that representatives of the defendant took his client's money "* * * and handed them this bunch of paper—that is just about what it amounted to—, * * * and they don't want to pay it. I'll tell you what: let's send them back up to Hartford and let them know how we feel about it in Tennessee." When the defendant objected, the Court stated to the jury:

> "Yes, there has been too much appeal to prejudice. Just disregard all this and decide it on the facts and the law as the Court gives it to you."

It is believed that this admonition by the Court and the cautionary instructions given at the time, together with the usual instructions, were sufficient to remove any sympathy or prejudice which the jurors may have acquired as a result of the improper arguments by counsel for both parties. **Cf. Twachtman v. Connelly**, C. C. A. 6th (1939), 106 F. (2d) 501, 509 [31], and **Chicago & N. W. Ry. Co. v. Kelly**, C. C. A. 8th (1934), 74 F. (2d) 31, 35 [3], T. C. A., § 56-1106.

The defendant complains also about the Court's admission of parts of exhibits Nos. 6 [sic: 5] and 7. These

exhibits were admitted only on the issue of the bad faith of the defendant in refusing to pay the plaintiff's claim. T. C. A., § 56-1105 imposed on the plaintiff the burden of showing that the refusal of the insurer to pay the loss was not in good faith. **Life & Cas. Co. v. Robertson**, C. A. Tenn. (1927), 6 Tenn. App. 43, 70 [21], certiorari denied (1928). These exhibits had a bearing upon the transaction out of which the competing claims of the parties[2] arose and were properly admitted. **Block v. Darling** (1891), 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476, 478 (headnote 4).

The further grounds urged by the defendant requiring no discussion, its motions hereby are

Overruled.

Enter

C. G. NEESE
United States District Judge

For publication

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[2] The defendant sought the statutory penalty from the plaintiff, as well.

APPENDIX B

Policies and Policyholders

56-1105. Additional liability upon insurers for failure to pay promptly insurance losses when refusal is not in good faith.—A. The insurance companies of this state, and foreign insurance companies and other persons doing an insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty (60) days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent (25%) on the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed.

* * * * * *